Nos. 92-482, 92-645

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE CHASE MANHATTAN BANK, N.A.,

Petitioner,

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*

Respondents.

STEPHEN R. STEINBRINK, ACTING COMPTROLLER OF THE CURRENCY, *et al.*,

Petitioners,

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Brief of First Interstate Bancorp, First Union Corporation, The Huntington National Bank, KeyCorp, National City Corporation, and Wells Fargo Bank, N.A. as Amici Curiae in Support of the Petitions

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QUESTION PRESENTED

Whether 12 U.S.C. § 24(Seventh) allows national banks, with the approval of the Comptroller of the Currency, to conclude that national banks may sell various forms of insurance as part of "the business of banking," despite the existence of 12 U.S.C. § 92, which grants national banks located in places of 5,000 or less population the additional power to "act as the agent for any fire, life, or other insurance company."

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INTEREST OF THE AMICI CURIAE[1]

Amici are national banks and bank holding companies with national bank subsidiaries engaged in the business of banking and various other activities, including insurance and insurance-related activities incidental thereto. *Amici* have a vital interest in legal questions affecting the scope of 12 U.S.C. § 24(Seventh) (1988 & Supp. II 1990), which your *amici* believe allows for a flexible and evolutionary conception of "the business of banking."

SUMMARY OF ARGUMENT

Since its enactment in 1864, the National Bank Act has addressed itself to the regulation of "the business of banking," without ever defining the meaning of that term. This lack of definition is critical to the long-term success of the statute, because from the colonial era to the present, the banking industry has traveled a path of evolution and change. That change has been guided by the long-term vision and special expertise of the chartering authority of national banks, the Comptroller of the Currency, who has exercised the authority to determine what activities are within, or "incidental to," "the business of banking." He has interpreted the National Bank Act to authorize, *inter alia*, certain insurance activities as a proper incident of "the business of banking."

Congress, by leaving "the business of banking" undefined, has left the evolution of the industry to be shaped by banks themselves, under the supervisory authority of the Comptroller. Congress has seen fit to intervene only when it has been necessary to override the evolutionary process and positively establish an activity as part of the business of banking *vel non*. The Court of Appeals' conclusion that the limited congressional grant of insurance authority contained in 12 U.S.C. § 92 forecloses the

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[1]The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.2 of this Court.

historical evolutionary process under the principle of *expressio unius est exclusio alterius*, is a major step toward replacing the proper regulatory role of the Comptroller with the inflexible and static decisions of courts. If left unreviewed, the Second Circuit's decision could severely curtail the ability of the banking industry to remain competitive by developing improved products and services using changing communications and computer technology. To preserve the existing statutory scheme of effective national bank regulation, this Court should grant certiorari.

REASONS FOR GRANTING THE PETITIONS

THE SECOND CIRCUIT'S CONSTRUCTION OF SECTION 24(SEVENTH) CRITICALLY THREATENS THE DEVELOPMENT AND SURVIVAL OF THE NATIONAL BANKING INDUSTRY.

The financial services industry is rapidly changing in response to changes in technology and increasing competition between banking and unregulated service providers. National banks look to decisions of the Comptroller of the Currency to be able to engage in the sale of newly-developed financial products, including banking-related insurance products. The Second Circuit's decision, however, threatens to handicap these banks by impairing the essential flexibility of § 24(Seventh)'s incidental powers clause. By denying the Comptroller the power to develop "the business of banking" in response to the rapidly-changing financial services marketplace, the Second Circuit's decision, if not reviewed, would effectively freeze the definition of "the business of banking," at least with respect to insurance activities,[2] in a manner which squares neither with the Comptroller's

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[2]Although the decision of the Court of Appeals applies only to title insurance, its approach, of giving no deference to the Comptroller's interpretation of a statute, could have the practical effect of supplanting the Comptroller's broad chartering and guiding role with an inflexible court-imposed definition of "the business of banking."

principal role in defining the contours of an evolving "business of banking" nor with the survival of national banks in an intensely competitive climate.

A. Banks and The Comptroller Have Developed "The Business Of Banking" in an Evolutionary Fashion.

In today's marketplace, national banks face substantial and ever-increasing competition from state banks, savings and loan associations, and non-bank financial institutions, including credit unions, insurance companies, and even retail stores.[3] Only national banks, though, are subject to the strictures of the National Bank Act. As we show below, the Second Circuit's interpretation of that Act threatens the development and provision of improved financial products to bank customers, and places national banks at a significant competitive disadvantage.

1. "The Business of Banking" Has Evolved Over Time.

The history of the American banking business is a history of change. Indeed, commercial banking was virtually unheard of in colonial America, due principally to two factors: the opposition of British merchants, and the colonists' general lack of experience with financial institutions. Ross M. Robertson, *The Comptroller and Bank Supervision: A Historical Appraisal* 13 (1968). The first commercial bank was not chartered in the United States until 1781, and by 1811, there were only 88 banks in the country. *Id.* These banks received deposits and made loans, *id.*; *see also*

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[3]Conglomerate financial institutions, such as Sears, "can now take deposits, cash checks, make loans, sell securities, sell insurance, and offer real-estate brokerage services, all under one roof." Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 677 (1983). *See also* Martin Mayer, *The Money Bazaars* 34-71 (1984) (outlining recent rise of "financial services institutions").

Comment, *Independent Bankers Association v. Conover: Nonbank Banks Are Not In The Business Of Banking*, 35 Am. U. L.Rev. 429, 439 n.41 (1986), however, most lending was limited to extremely short terms. Some banks limited their discounts to 30 days, others extended credit for as long as 60 days. Robertson, *supra*, at 15. The "most important function" of banks at that time, however, was the issuance of notes, which served as money. Edward L. Symons, Jr., *The "Business of Banking" In Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 686 (1983).

Significantly, however, even during that early era, "the most inventive bankers were forever experimenting with new types of credit, finding new ways to earn profits for their stockholders while protecting the solvency of their institutions." Robertson, *supra*, at 15. The development of such new financial services was effected without explicit Congressional (or judicial) direction. Among other things, those institutions thought of as the "sophisticated banks of the East" began practicing what is now called "investment banking," including underwriting securities issues and buying private and municipal bonds. *Id*; *see also* Symons, *supra*, 51 Geo. Wash. L. Rev. at 687. The banking franchise, largely embodied in § 24(Seventh) of the National Bank Act, was widely recognized to accommodate such diverse financial activities -- at least until Congress adopted § 16 of the so-called Glass-Steagall Act, which, *inter alia*, explicitly amended that provision to curtail certain securities activities in response to the collapse of the Great Depression. Act of June 16, 1933, ch. 89, 48 Stat. 162, 184 (codified as part of 12 U.S.C. § 24 (Seventh)).

At the beginning of the nineteenth century, three new types of financial institutions -- unincorporated banks, mutual savings banks, and insurance companies -- began to emerge. The unincorporated banks differed from chartered banks primarily by the fact that the unincorporated banks did not issue notes. Mutual savings banks and insurance companies, on the other hand, amassed their capital through long-term credit activities such as

individual savings accounts and life insurance. Symons, *supra*, 51 Geo. Wash. L. Rev. at 688 & n.63.

Notwithstanding these changes, the United States did not have a uniform currency at the time of the Civil War; "some 9,000 different kinds of paper bills were in circulation" by 1860. Robertson, *supra*, at 29. So Congress, faced with a nation divided by war and beset by desperate financial problems, passed the National Currency Act of 1863, ch. 58, 12 Stat. 665, which for the first time gave the country a national currency (national banks nonetheless retained the privilege of issuing those notes). That Act gave national banks certain enumerated powers, but also bestowed upon national banks explicitly undelineated authority to "exercis[e] such incidental powers as shall be necessary to carry on the business of banking."[4] That Act also created the position of Comptroller of the Currency, head of a separate bureau within the Treasury, charged with the dual role of chartering and supervising national banks. Congress clearly envisioned the Comptroller to have a quasi-independent role as the overseer of national banks: The Comptroller was to serve a term longer than the President (five years), could only be *removed* (as well as appointed) by the President with the advice and consent of the Senate, and was annually required to report directly to Congress, not through the Secretary of the Treasury.[5] "Congress ob-

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[4]Virtually the same language ("To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking") appears in the current version of the statute, 12 U.S.C. § 24(Seventh). Neither the National Currency Act, nor its immediate successor, the National Bank Act, nor any other act, has defined this term.

[5]When Congress passed the National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified at 12 U.S.C. § 21 *et seq.*), which replaced and improved upon large parts of the previous year's National Currency Act, the removal provision was changed to "upon reasons to be communicated by [the President] to the Senate." The five-year term and the direct reporting to Congress, however, both remain to this day. *See*

viously considered the Comptrollership a major job. . . . The obvious person for such a position would be a seasoned banker." Robertson, *supra*, at 47. The Comptroller and his Office today remain outside the fiscal purview of Congress, as funds for maintaining the Office are obtained from assessments on national banks, not from Congressional appropriations. 12 U.S.C. § 10 (1988); Robertson, *supra*, at 171.

The evolution of "the business of banking" continued throughout the late nineteenth century under the largely unfettered auspices of the Comptroller and his state bank counterparts. While the issuance of notes provided banks an "undeniable advantage" in 1865, it had become an "anachronism" by the early 1880s as banks expanded their retail and leasing functions. Robertson, *supra*, at 62, 64. Expansions of some bank activities, including, *inter alia*, branching, were effected by explicit statutory authorizations. By the end of the 19th century, national banks were interested in opening branches in rural areas to meet the needs of those communities. Recognizing that national banks were compelled to compete with state institutions (which generally operated under much more liberal banking laws), Comptroller D.R. Crissinger recommended to Congress that national banks be explicitly allowed to operate branch offices. Comptroller of the Currency, *Annual Report* 2-3 (1922). Ultimately, Congress passed the McFadden Act in 1927 to amend the National Bank Act and specifically authorize limited branching of national banks.[6] Act of Feb. 25, 1927, ch. 191, 44 Stat. 1224. A number of pieces of Depression-era legislation expanded national banks' branching powers even more. *See generally* Douglas H. Ginsburg, *Interstate Banking*, 9 Hofstra L.Rev. 1133, 1153-54 (1981).

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12 U.S.C. §§ 2, 14 (1988).

[6]Despite providing definitions of terms such as "branch," the McFadden Act continued to leave "the business of banking" undefined.

In 1914, the Federal Reserve System was created. No longer were banks responsible for issuing paper currency; the Federal Reserve Banks assumed that task. National banks turned to further developing the retail banking system -- developing and providing many of the convenient financial products and services enjoyed by individual customers today -- and expanding the nation's capital strength through the reinvestment of accumulated consumer savings.

A watershed moment in the history of American banking was the Great Depression: "[M]ore than any other business, commercial banking was especially hard hit." Robertson, *supra*, at 118. As the economy ground to a halt, so did the business of banking.[7] In the words of one historian, the collapse of the American banking system "had very nearly destroyed the edifice of American capitalism." *Id.* at 125. To ensure that that edifice remained intact, the Federal Deposit Insurance Corporation (FDIC) was created. FDIC deposit insurance and the continued growth of multi-branch and multi-unit banking led the way to the banking system's restored stability. *See generally id.*

The present era of remarkable metamorphosis began in the 1950s. Competition has been one factor in this acceleration of change. Banks of the mid-1950s were "inclined toward more aggressive competition than had been witnessed for a generation." *Id.* at 144. Also, among other factors, technology has become a major driving force behind the sea change in the business of

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[7]For four days in 1933, President Roosevelt declared a "bank holiday," and "the business of banking" was restricted to making change, cashing government checks, and switching checks to drawers' accounts so long as no cash payment was required. Ross M. Robertson, *The Comptroller and Bank Supervision: A Historical Appraisal* 122 (1968).

banking.[8] Traditionally, people and businesses relied on bank deposits to hold their savings;[9] now, banks are no longer the only institutions engaged in what used to be thought of as "banking."[10] More recently, the advent of improved telecommunications and computer technology, particularly the ability to manipulate large volumes of data, has not only reshaped the delivery system of banks but also remade the various types of financial products available today, including deposit-like vehicles such as money market funds and hybrid bank-investment and insurance-related products. Significantly, such product developments as mutual funds result in bank-like liquidity offered by

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[8]"Conceptually, what had made a bank unique was its ability to create money. . . . Operationally, what had made a bank unique was that it could handle the storage and payment of money, an immense job requiring armies of tellers at windows and clerks with ledgers and sorters who stood before honeycombs of pigeonholes to slot checks . . . . Then came the computer." Mayer, *supra* note 3, at 6, 7, 8.

[9]Indeed, as recently as 1963, this Court embraced a traditional borrowing-lending-depositing view of banking. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 326-27 n.5 (1963).

[10]By the late 1950's,

> commercial banks were collectively under the pressure of competition from a group of financial institutions known as nonbank intermediaries. These institutions -- notably savings and loan associations, life insurance companies, mutual savings banks, credit unions, and uninsured pension funds -- were making inroads on commercial-bank business before World War II, but it was not until after the war that they seemed to pose a serious threat. In particular, savings and loan associations waged vigorous campaigns to capture both the savings and the customer loyalty of American households, and the banking community became concerned that the S & Ls would soon be given wider lending and investment privileges.

Robertson, *supra* note 7, at 144.

nonbanking competitors, indistinguishable for all important purposes from "banking". Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 Mich. L. Rev. 672, 677-78 (1987). *See also* Symons, *supra*, 51 Geo. Wash. L. Rev. at 677. The money-market fund itself is a direct competitor to banks' traditional deposit business. Relying on the essential statutory flexibility of 12 U.S.C. § 24 (Seventh), banks have responded by developing similar highly-competitive products.

On the lending side, banks are no longer the only or principal source of lending. Unregulated non-banks increasingly provide financial products similar to those available from banks. Richard M. Whiting, *A Perspective On Financial Services Restructuring*, 37 Cath. U.L. Rev. 347, 361 (1988). *See generally* Mayer, *supra*, at 34-71. Significantly, finance companies and insurance companies have now displaced commercial banks as the major providers of consumer installment credit. *The Recent Performance of the Commercial Banking Industry*, Fed. Reserve Bank of N.Y.Q. Rev. 3, 5-6 (Summer 1986). *See generally* Whiting, *supra*, 37 Cath. U. L. Rev. at 361-62. Trust departments, pension funds, and insurance companies all loan money on a short-term basis, frequently accepting rates of interest lower than those demanded by commercial banks. Langevoort, *supra*, 85 Mich. L. Rev. at 679. And "[t]hrough the so-called commercial-paper market, high-quality corporate borrowers have tapped this demand [for short-term loans], utilizing communications and record-keeping technology that permits efficient matching and transactions between themselves and their creditors. By issuing commercial paper instead of borrowing from a bank, corporations effectively eliminate the intermediary in their acquisition of capital." *Id.* (footnote omitted).[11]

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[11]By the spring of 1982, the quantity of commercial paper on the market reached 80% of the quantity of commercial and industrial loans of the entire American banking system. Mayer, *supra* note 3, at 26.

Advances in technology and increased unregulated competition have dramatically affected profits and risks in areas traditionally recognized as the core business of banking. The changing financial services landscape has eliminated some of banks' most profitable borrowers and correspondingly pressured those banks to make lower-quality loans to higher credit risks in order to compensate for the loss of the better business. *See* 48 Banking Rep. (BNA) 152 (Jan. 19, 1987). With the loss of much of their traditional businesses, banks have necessarily looked in other directions for business. In short, "banks, as we have known them, should be seen as creatures of a time when information was expensive. . . . Now, technologically, any number can play [in the financial services market]; and the old games with their rigid rules and limited participation are gone forever." Martin Mayer, *The Money Bazaars* 378-79 (1984).[12]

Although "the business of banking" has changed significantly since 1863, the statute remains the same.[13] "[C]ommentators

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[12]*See also* Arthur F. Burns, *The Ongoing Revolution in American Banking* 25 (1988):

> By 1980 banking had changed fundamentally. In the new era banks found themselves competing vigorously at home and abroad for the business of depositors and borrowers who were becoming more sophisticated, whose needs were growing more complex, whose operations for meeting their needs were continually expanding, and whose decisions were now likely to turn on fractions of a percentage point and interest rates rather than on number of years of personal acquaintance.

[13]While there have been notable efforts in other statutes to define terms such as "bank," *see, e.g.*, 12 U.S.C. § 1841(c) (1988), Congress has refused for 129 years to define "the business of banking" in the National Bank Act. It is thus clear that notions of what "the business of banking" *is* continue to evolve, and this evolution has confounded even the most notable authorities. *See, e.g.*, Mayer, *supra* note 3, at 4 (noting "dilemmas" of Federal Reserve Board and quoting Chairman Paul

uniformly have recognized that the National Bank Act did not freeze the practices of national banks in their nineteenth century forms." *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). *Cf. Oklahoma ex rel. State Banking Bd. v. Bank of Okla.*, 409 F. Supp. 71, 84, 90-91 (N.D. Okla. 1975) (concluding that although automated teller machines (ATMs) were unknown in 1927, at the time of the adoption of the McFadden Act, the Comptroller's view, that ATMs were incidental to the business of banking and not "branches," was entitled to great weight). Because of technological developments and market forces, the banking industry changed and must continue to change to survive. "While the functions historically performed by banks continue to grow in significance, the role of bankers in performing them has already diminished and will be reduced further. The future of banking is up for grabs, and there are many grasping hands in the air." Mayer, *supra*, at 4.

2. The Comptroller Has Played a Pivotal Role in Developing "The Business of Banking."

The National Bank Act recognizes and amply accommodates the evolutionary character of banking by providing undefined and flexible authority for banks, under the guidance and direction of the Comptroller, to define "the business of banking" in response to marketplace considerations. That same Act established the Comptroller to have pervasive regulatory authority of national banks, thus empowering him to interpret "the business of banking" in light of changing economic conditions and technology. Even the Second Circuit recognized the Comptroller's

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Volcker as stating "My instinct is that there's something unique about a bank."); Douglas H. Ginsburg, *Interstate Banking*, 9 Hofstra L.Rev. 1133, 1137 (1981) ("What is 'the business of banking'?"). Even a leading treatise on banking law skillfully evades a definition of "the business of banking." *See* 1 Raymond Natter, *et al.*, *Banking Law* § 1.03, at 1-6 to 1-8 (1992).

special role in giving meaning to the National Banking Act. *See* Chase Pet. at 10a[14] (citing *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987)). Since the Comptroller "possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress," *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971), the long-term evolution of "the business of banking" is "within [his] area of special expertise," *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983).

Courts have recognized the special regulatory authority of the Comptroller, noting that the preparation of a comprehensive charter to guide "the business of banking" over time is a function belonging solely to the Comptroller of the Currency. *M & M Leasing*, 563 F.2d at 1384. *Accord American Ins. Ass'n v. Clarke*, 865 F.2d 278, 282 (D.C. Cir. 1988) (noting Comptroller's "expert financial judgment"). Congress originally recognized in the enactment of the National Bank Act that a legislature is not itself equipped to continuously adjust the banking laws to accommodate the rapid changes in the banking business, since most banking legislation is necessarily backward-, rather than forward-looking.[15] Indeed, Congress itself has reaffirmed the expansive flexibility of the law by leaving unaltered a long line of expansive Comptroller interpretations. The only institution well-equipped to guide and define the evolution of "the business of banking" is the Comptroller of the Currency. In recognition of the Comptroller's role, one federal appeals court said long ago that "[c]ourts have nothing to do with determining the policy which national banks should pursue. That is a question for the Comptroller of the Currency and the banks themselves so long as

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[14]Citations to "Chase Pet." are to Chase Manhattan Bank, N.A.'s Petition for Writ of Certiorari.

[15]"[M]uch of commercial bank regulation in this country is aimed at weaknesses, real or fancied, that became apparent in depressions long since forgotten." Robertson, *supra* note 7, at 7.

that policy is not unlawful and does not offend against public policy." *Baltimore & Ohio R.R. v. Smith*, 56 F.2d 799, 802 (3d Cir. 1932).

The Comptroller has provided this long-term guidance principally through his power to define what incidental powers are "necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). One of the factors which the Comptroller has traditionally considered in determining what is necessary to carry on the business of banking is the need for national banks to meet their competition.[16] One of the principal objectives of bank regulation is to oversee and promote the financial soundness of banking institutions. Robert C. Clark, *The Soundness of Financial Intermediaries*, 86 Yale L. J. 1 (1976); Michael Mussa, *Competition, Efficiency, and Fairness in the Financial Services Industry*, in *Deregulating Financial Services: Public Policy in Flux* 121, 128-35 (George G. Kaufman & Roger C. Kormendi eds., 1986). To this end, the Comptroller has interpreted § 24(Seventh) to authorize national banks to engage in leasing activities,[17] real estate appraisal services,[18] real estate asset management and advisory services,[19] investment advice,[20]

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[16]This has long been established as an appropriate criterion under § 24(Seventh). *See, e.g., Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377 (1954); *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41, 49 (1940); *First Nat'l Bank v. Hartford*, 273 U.S. 548, 558 (1927).

[17]Comptroller Interp. Letter No. 369, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,539 (Sept. 25, 1986). *See generally* 12 C.F.R. § 7.3400 (1992).

[18]Comptroller Interp. Letter No. 467, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,691 (Jan. 24, 1989).

[19]Comptroller Interp. Letter No. 389, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,613 (July 7, 1987).

computer processing and telecommunications services,[21] electronic switching systems for automated teller machines,[22] and data processing.[23] The Comptroller explicitly recognized the need for national banks to fairly meet their competition in his 1986 interpretive letter allowing banks to sell title insurance. Chase Pet. 41a.[24]

B. The Second Circuit Erred in Denying The Comptroller Authority To Approve Certain Insurance Activities as an Important Element of The Modern Business of Banking.

The Second Circuit's broadly-drawn holding, that § 92 prohibits national banks from acting as agents for "'any . . . insurance company'", Chase Pet. 14a, contravenes long-standing and reasonable interpretations of § 24(Seventh) by the Comptroller which have been upheld by federal Courts of Appeals

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[20]Comptroller Interp. Letter No. 367, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,537 (Aug. 19, 1986).

[21]Comptroller Interp. Letter No. 381, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,605 (May 5, 1987).

[22]Comptroller Interp. Letter No. 382, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,606 (May 5, 1987).

[23]Comptroller Interp. Letter No. 345, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,515 (July 9, 1985).

[24]The thin legislative history of § 92 relied upon by the Second Circuit illustrates that competition has long been a special area of the Comptroller's concern. The letter of Comptroller Williams, proposing legislation that would become § 92, noted that its purpose was to provide banks in small communities "with additional sources of revenue." 53 Cong. Rec. 11,001 (1916).

in the past. By construing the implied limitations of § 92[25] together with § 24(Seventh)'s incidental powers provision, the Comptroller has interpreted the banking laws to allow national banks to develop and sell various insurance-related products, *e.g.*, debt cancellation contracts,[26] municipal bond insurance,[27] and credit-related life insurance.[28] These developments have undoubtedly benefitted consumers by ensuring the efficient and price-competitive availability of such financial products.

As Petitioner Chase has correctly pointed out, the plain language of § 92 leads to the conclusion that Congress meant only to grant national banks in small towns an additional income

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[25]Notwithstanding *Independent Ins. Agents of Am. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *cert. pending* (Nos. 92-484 and 92-507), your *amici* have assumed, throughout this brief, that § 92 remains in full force and effect. Should this Court affirm in Nos. 92-484 and 92-507, your *amici* contend that that result would compel reversal of the Second Circuit's judgment, since the "implied bar" of § 92 found by the Second Circuit would no longer exist to limit the Comptroller's powers under § 24(Seventh).

[26]*See* 12 C.F.R. § 7.7495 (1992) (debt cancellation contracts are similar to credit life insurance) *and First Nat'l Bank v. Taylor*, 907 F.2d 775, 777-78 (8th Cir.), *cert. denied*, 111 S. Ct. 442 (1990).

[27]*See* Comptroller Interp. Letter No. 338 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,508, at 77,792 (May 2, 1985) *and American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988).

[28]*See* 12 C.F.R. § 2.6 (1992); Comptroller Interp. Letter No. 277 [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,441 (Dec. 21, 1983) (underwriting credit life insurance, which is much riskier to banks' financial well-being than an agency arrangement. *See* Stephen K. Huber, *Insurance Powers of Banking Organizations*, 8 Ann. Rev. Banking L. 147, 149 (1989)); *and Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

source. There is thus no need to resort to canons of construction, as did the Second Circuit, to elucidate the plainly-expressed meaning of § 92. *See Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last.").

By resorting to a second canon of construction beyond the four corners of the statute, the Second Circuit implicitly found § 92 ambiguous. But it is clear that if there is an ambiguity, the Second Circuit did not go far enough to resolve it. The Second Circuit, following *Saxon v. Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968), applied the maxim *expressio unius est exclusio alterius* and concluded that Congress, by explicitly empowering national banks in places of 5,000 or fewer people to sell "any fire, life, or other insurance", implicitly meant that national banks in all other places were *not* empowered to sell such insurance. The Second Circuit specifically noted that if Congress believed that all national banks already possessed this authority, "this provision would have been superfluous." Chase Pet. 12a.

Such logic fails entirely in light of the fact that the activities encompassed within "the business of banking" have evolved under the Comptroller's supervision. Congress' grant of explicit authority to sell insurance in small towns thus must be viewed as a decision positively to establish that authority, rather than to rely on the evolutionary process which would otherwise govern. The Comptroller's decision to allow sales of certain types of insurance in areas other than those covered by § 92 is consistent with the continued evolution of "the business of banking". Congress simply meant to be very clear about the existence of such authority in small towns.

In reaching its result, the Second Circuit held that "any fire, life, or other insurance" as used in § 92 means "any insurance," despite the fact that Congress did not write it that way. Chase Pet. 14a. It should have applied the maxim of *noscitur a sociis*

to interpret what "other insurance" in § 92 means.[29] This is what the Comptroller did. In his 1986 interpretive letter, the Comptroller recognized the *expressio unius* rationale of *Saxon*, see Chase Pet. 42a, but concluded that "title insurance . . . . is sufficiently unlike life, property, and casualty insurance to justify treating it differently from these forms of insurance for regulatory purposes." *Id.* at 41a-42a.[30]

The Comptroller's construction deserved deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Comptroller's interpretation of § 24(Seventh) and § 92 of the National Bank Act was a reasonable one, and the Court of Appeals should have deferred to it. By picking the canon most relevant to their result, but eschewing the canon relied upon by the Comptroller in issuing his interpretive letter, the Second Circuit effectively usurped the role of the Comptroller, a role flatly foreclosed to it by *Chevron*.

National banks have ordered their affairs based on the Comptroller's interpretations of § 92 which have been affirmed by various courts of appeals. The national banks represented by your *amici* have relied on being able to sell various forms of limited purpose insurance to enable them to stay competitive in the financial services market. To now upset the Comptroller's reasonable interpretation of § 92 and 12 U.S.C. § 24(Seventh) could have the effect of seriously upsetting the settled business

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[29]This Court has adhered steadfastly to the rule that words grouped in a list should be given related meaning. *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990); *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989); *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 8 (1985); *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 207, 218 (1984).

[30]This letter also recognized that, as part of their business, "banks traditionally have been involved in the title insurance business." Chase Pet. 41a.

expectations of an already-disadvantaged industry. This Court has shown a special solicitude for continuity "in cases involving property and contract rights, where reliance interests are involved." *Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991). The same special solicitude should have been granted to the Comptroller's long-standing conclusion that the sale of certain insurance products is an incidental power necessary to the business of banking. *See, e.g., Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-58 (1978) (administrative interpretation sustained in view of "substantial reliance interests").

As Justice Frankfurter presciently remarked over fifty years ago, "when Congress has spoken at best with ambiguous silence -- a long continued practice pursued with the knowledge of the Comptroller of the Currency is more persuasive than considerations of abstract conflict between such a practice and purposes attributed to Congress." *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 (1940). Given the reasonableness of the Comptroller's interpretation of the National Bank Act, the reliance thereon by national banks, and the need of those banks to compete with the less-fettered "financial services industry" for their survival, the Second Circuit should not have invalidated a permissible construction of a statute which the Comptroller reasonably has determined makes the selling of title insurance incidental to "the business of banking."

In large part due to the statutory flexibility embodied in the incidental powers clause of § 24(Seventh), "the business of banking" has not remained static and is not the same as it was in 1863, or even in 1963. Banks, with the continuous guidance of the Comptroller, have heretofore been able to meet and lead in the development of financial products and services, constrained only by the agency and when Congress has seen fit to explicitly intercede (as it did to constrain investment banking practices via the Glass-Steagall Act). Against the backdrop of the recent S & L crisis, and predictions that a national bank crisis looms, the Comptroller is best able to take into account the need for banks

to compete fairly with their competitors in order to survive. If not reviewed, the Second Circuit's decision will eliminate important business opportunities, diminish significantly national banks' ability to compete profitably, and seriously endanger the evolution, let alone the future, of the business of banking.

CONCLUSION

The petitions for writ of certiorari should be granted.

Respectfully submitted,

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